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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
RCC Holdings, Inc.	)	
	)	
Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama	)	
	)	

OPPOSITION TO APPLICATION FOR REVIEW

RCC HOLDINGS, INC

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Summary

The Alabama Rural Local Exchange Carriers ("ARLECs") fail to provide a single legitimate reason to disturb the recent grant of eligible telecommunications carrier ("ETC") status to RCC Holdings, Inc. ("RCC") throughout its licensed service area in Alabama. In its *Memorandum Opinion and Order* ("*MO&O*") granting RCC's request, the Wireline Competition Bureau ("WCB") propcrly found that RCC demonstrated its commitment and ability to provide the supported services throughout its service area and to advertise those services, and that designation of RCC as an ETC in area service by rural telephone companies is in the public interest.

In their Application for Review, the ARLECs completely ignore the pro-competitive objectives of the Telecommunications Act of 1996 by urging a "public interest" analysis that primarily considers the interests of incumbent ETCs. Moreover, the ARLECs neglect to address the numerous prior decisions in which the WCB found the designation of wireless carriers in rural areas to be in the public interest. The ARLECs also utterly fail to counter the WCB's finding that RCC's designation as an ETC would bring important benefits to rural consumers, including increased customer choice, innovative services, and new technologies. Additionally, the ARLECs inappropriately ask the Commission to suspend application of existing law based on the vague notion that some of its rules may one day be changed. Finally, they express concern about "excessive" growth of the high-cost fund and attribute it to competitive ETCs, even though growth in the fund has resulted primarily from large increases in support to incumbent local exchange carriers such as the ARLEC member companies.

For all the above reasons, the Application for Review should he denied.

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OPPOSITION TO APPLICATION FOR REVIEW

RCC Holdings, Inc. ("RCC") hereby submits its Opposition to the Application for Review ("Application"! filed by the Alabama Rural Local Exchange Carriers ("ARLECs") in the captioned proceeding on December 23, 2002, challenging the Wireline Competition Bureau's ("WCB") *Memorandum Opinion and Order*, DA 02-3181 (released November 27, 2002) ("*MO&O*")

The WCB correctly followed Congress' pro-competitive mandate, as expressed in the Telecommunications Act of I996 ("1996 Act"), and consistently applied FCC **law** and precedent flowing therefrom in reaching its conclusion that RCC is qualified to be an ETC and that a grant of its petition will serve the public interest. The ARLECs have failed to demonstrate how consumers in Alabama will be harmed by a grant of RCC's petition. Issues now raised by the ARLECs implicate broader policy questions best left for the FCC's ongoing referral to the Federal-State Joint Board on Universal Service ("Joint Board").[1]

For the reasons set forth below, the ARLECs' Application must be denied.

I. THE COMMISSION'S PUBLIC INTEREST ANALYSIS WAS CONSISTENT WITH THE ACT AND COMMISSION PRECEDENT

A. The WCB's Public Interest Analysis Properly Took the 1996 Act's Pro-Competitive Purposes into Account

In its analysis of whether a grant of RCC's petition would serve the public interest, the WCB propcrly focused on *whether consumers would benefit* from the introduction of competition in the designated areas. Congress provided a clear answer to this question in the 1996 Act by setting forth a comprehensive law to encourage competition in the nation's local exchange marketplace

The ARLECs' claim that universal service is "a venture fund to create 'competition' in high-cost areas"[2] distorts how federal policy evolved. In fact, universal service began in a monopoly environment as system of implicit subsidies that kept long distance, business, and urban rates artificially high and perpetuated inefficient ILEC rate structures.' Congress changed all of this with the adoption of the 1996 Act, declaring its intent to open "all telecommunications markets" to competition.'

This statutory focus was reflected in the new provisions on universal service, which provided, for the first time, that multiple carriers could receive universal service subsidies in the same market, including rural markets.' Congress recognized that under a system of implicit subsidies, available only to rural ILECs, there will never be facilities-based competition in most,

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1 **See** *Federal-State Joint Board on Universal Service. Order,* FCC 02-307 (rel. Nov. 8, 2002) ("*Referral Order*").

Id. at pp. 5-6.

ROBI HT W. CRANDALL AND LEONARD WAVERMAN, WHO PAYS FOR UNIVERSAL SERVICE? 7-8 (2000).

4 *See* Joint **Explanatory** Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess at 113.

See 47 U.S.C. § 214(e)(2)

if not all, of rural America. Only if implicit subsidies are made explicit and portable to competing carriers can consumers in rural areas begin to enjoy the choices that are available to consumers in urban areas.[6] The WCB propcrly followed Congress' lead in finding that the public will be well served by RCC's designation

In an attempt to deflect attention from the clearly pro-competitive purposes of the 1996 Act, the ARLECs mischaracterize the holding of the U.S. Court of Appeals for the District of Columbia Circuit in *U.S. Telecom Association* v. *FCC.*[7] In that case, when the D.C. Circuit expressed doubt that the 1996 Act's purposes would be fulfilled by "completely synthetic competition," the Court was referring to its concern that the Commission's unbundling rules were not furthering the Congressional objective of promoting *facilities-based competition.*[8] Far from cautioning against competition, the Court's complaint was that the FCC was not doing enough to promote it. RCC has committed lo provide facilities-based competition throughout its designated ETC service area without reliance on ILEC unbundled network elements.' Contrary *to* the ARLECs' claim, the D.C. Circuit's holding only reaffirms the 1996 Act's goal of introducing the kind of competition RCC will bring to rural areas of Alabama

The ARLECs also rely on Justice Breyer's separate opinion concurring in part and dissenting in part in *Verizon v. FCC,* which clearly does not reflect the views of the seven

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[6] 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban arras and are available at rates that are reasonably comparable to rates charged for similar services in urhan areas"). *See also Federal-State Joint Board on Universal* ***Service,*** *Report and Order,* 12 FCC Rcd *8776. 8786* (1997) ("*First Report and Order*") ("The amount of support will be explicitly calculable and identifiable by competing carriers, and will be portable among competing carriers, i.e., distributed to the eligible telecommunications carrier chosen by the customer").

[7] *U.S Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002)

[8] *Id*

See Petitioii atp. **8.**

justices who comprised the majority. Indeed, the majority was clear on the pro-competitive objectives of the 1996 Act:

> For the first time, Congress passed a ratesetting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated monopolies vulnerable lo interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets.''

Moreover, the majority directly addressed and rejected Justice Breyer's arguments.[11] Thus, *Verizon* reaffirms the 1996 Act's purpose of promoting local competition and is concerned only with the issue of whether the Commission's rules go far enough to further those pro-competitive objectives

B. The WCB's Analysis is Supported by Commission Precedent

The ARLECs wrongly claim that the *MO&O* "prematurely sets a precedent".[12] On the contrary, ample Commission precedent is in place and the WCB's public interest analysis followed previous dccisions granting ETC status to wireless carriers in areas served by rural telephone companies. In several prior decisions, the WCR has conducted the statutory public interest analysis by focusing on competitive benefits, specifically considering (1) whether consumers will benefit from competition, and (2) whether consumers would be harmed by the designation of an additional ETC.[13] For example, in granting Western Wireless Corporation ETC status in Wyoming, the WCB concluded:

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10 *Verizon Communications, Inc. v. FCC*. 12 S.Ct. 1646, 1661 (2002).

11 *See id.* at 1676 .

12 Application at p. 1.

13 *See, e.g., Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 55 (2000) ("*Western Wireless*"); *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18137-39 (2001) ("*Pine Ridge*"); *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications*, CC Docket No. 96-45, DA 02-174 (C.C.B. rel. Jan. 25, 2002) at ¶¶ 15-16 ("*Guamcell*").

> We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.[14]

Turning to the specific petition before it, the Bureau concluded that the competition that would result from the designation of an additional ETC would benefit consumers in the designated area. Specifically, the Bureau concluded that consumers would benefit from the "increased customer choice, innovative services, and new technologies" and that incumbents would have an incentive to improve service in order to remain competitive, all to the benefit of rural consumers.[15] The WCB also concluded that the designation would not harm rural consumers, since the applicant had demonstrated sufficient commitment and ability to serve customers in the event an incumbent LEC relinquished its ETC status."[16] The WCB's analysis was upheld by the full Commission on reconsideration."[17]

In the *Pine Ridge* order, the WCB clarified that those objecting to the designation bear the burden of "present[ing] . . . evidence that designation of an additional ETC in areas served by

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[14] *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 57 (2000) ("*Western Wireless*").

[15] *See id.* at 55.

[16] *See id.* at 55-56.

[17] *See Petitions for Reconsideration of Western Wireless Corporation's Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, FCC 01-311 (rel. Oct. 19, 2001) ("*Western Wireless Recon. Order*").

rural telephone companies will reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas."[18]

More recently, in its January 2002 *Guamcell* decision, the WCB applied the same analysis used in *Western Wireless* and *Pine Ridge*, concluding that "the island of Guam will benefit from competition in the provision of telecommunications service", specifically finding that:

> . . . competition in Guam should result not only in increased choices higher quality service, and lower rates, but will also provide and incentive to the incumbent rural telephone company to introduce new and innovative services, including advanced service offering, to remain competitive, resulting in improved service to Guam consumers.[19]

Proceeding to the next step in its analysis, the WCB then concluded that consumers would not be harmed, by Guamcell's designation, emphasizing that the applicant's use of its own facilities would enahlc it to scrvc customers otherwise left without service in case an ILEC relinquished its ETC status.")

In the instant proceeding, thc WCB followed *Western Wireless. Pine Ridge,* and *Guamcell* in concluding that:

> [c]ompetition will allow customers in rural Alabama to choose service based on pricing, service quality, customer service, and service availability. In addition, we find, that the provision of Competitive service will facilitate universal service to the benefit of consumers in Alabama by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."[21]

[18] *Pine Ridge, supra,* 16 FCC Rcd at 18138.

[19] *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications,* CC Docket No. 96-45, DA 02-174 (C.C.B. rel. Jan. 25, 2002) at ¶ 15 ("*Guamcell*").

[20] *See id.* at ¶ 17.

[21] *MO&O* at ¶ 23.

Consistent with its prior decisions, the WCB concluded that consumers will not be harmed, finding that "there is no reason to believe that consumers in the affected rural areas will not continue to be adequately served should the incumbent carrier seek to relinquish its ETC designation."[22] Moreover, the WCB properly concluded:

> The parties opposing this designation have not presented persuasive evidence to support their contention that designation of an additional ETC in the rural areas at issue will reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency.*'

The ARLECs incorrectly assert that the WCB's *MO&O* is called into question by its reliance on *Pine Ridge*.[24] The WCB's public interest analysis was consistent not just with *Pine Ridge,* but with other decisions as well.[25] The ARLECs fail to address the other decisions, discussed above, which support the conclusions reached in the *MO&O*. Second, *Pine Ridge* is not "materially diffcrent" as the ARLECs allege.[26] In both cases, the WCB concluded that the applicant had successfully made the "threshold demonstration" that its service offering "fulfils several of the underlying federal policies favoring competition and the provision of affordable telccommunications service Io consumers."[27] The only difference in the analysis in *Pine Ridge* was that, having determined that the applicant's designation was in the public interest, the WCB added that a grant of the requested ETC status "will also serve the public interest by removing

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22 *Id.* at ¶ 25

23 *Id* at ¶ 26

24 ***See*** Application at p. 21

25 RCC notes that, if an order is consistent with Commission prrcedent, it is unnecessary for all supporring authority to be actually cited in the order. Significantly, Section 1.115 ofthc Commission's rules docs *not* list failure to cite all relevant precedent among the grounds for overturning an action taken pursuant to delegated authority *See* 47 C.F.R. § 1.115.

26 *See* Application at p. iv

27 *MO&O* at ¶ 22: *Pine Ridge, supra.* at 18137

impediments to increasing subscribership on the Reservation."[28] The ARLECs neglect *to* mention that the WCB had already made the public interest determination, consistent with its earlier dccisions. Its discussion of *additional* reasons supporting a public interest finding does not diminish or qualify its previous conclusions.

Accordingly, it is clear that the WCB propcrly applied its own precedent in its analysis of the public interest benefits ofdesignating RCC as an ETC throughout its service area in Alabama.

C. The ARLECs Failed to Show that Consumers Would be Harmed

Contrary to the ARLECs' assertion,[29] the WCB properly weighed the benefits enumerated above against the potential for harm to rural consumers. Addressing the ARLECs' arguments raised in comments and in several *ex parte* filings, the WCB properly concluded that RCC's designation throughout its Alabama service area would not harm rural consumers.

The ARLECs complain about broad policy questions concerning how ETCs are to receive high-cost support, yet they ignore the simple fact that they have never made any specific showing in this case that RCC's designation might result in reduced infrastructure investment, increased rates, diminished service quality, or lost network efficiency. In filing comments in opposition to RCC's Petition and in multiple *ex parte* presentations, the ARLECs "merely presented data regarding the number of loops per study area, the households per square mile in their wire centers. and the high-cost nature of low-density rural areas."') In response, RCC demonstrated that the ARLECs inappropriately used Benchmark Cost Proxy Model 3.0, which

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[28] *Pine Ridge, supra*, at 18137-38

[29] **Application** at p. 16.

[30] *MO&O* at ¶ 26.

produces inaccurate results and overstates the necessary investment in network facilities, especially in areas of low line density. In addition, the ARLECs improperly relied on household density, averaged at the census block level, as a predictor of network costs in rural areas. Even accepting the **ARLECs'** position that sparsely populated areas are expensive to serve, those areas are precisely where the FCC has attempted to stimulate competition and deployment of more efficient technologies, and where competitive carriers cannot reach many customers without high-cost support

In sum, the WCB properly rejected the ARLECs' speculative arguments that rural consumers would be harmed by RCC's designation

II. ONGOING REVIEW OF USF ISSUES DOES NOT JUSTIFY SUSPENSION OF EXISTING RULES

The ARLECs claim it is "premature" for the WCB to designate any additional ETCs in rural areas until the Commission has resolved those matters raised in its November 8 *Referral Order*.[31] In cffcct, the ARLECs absurdly ask the Commission to freeze the processing of pending applications, validly filed under existing rules, while the Joint Board considers a possible recommendation to the FCC

It scarcely hears mention that the law by its very nature is constantly evolving, and that no rule is immune from review. Congress and governmental agencies such as the FCC are tasked with changing and improving the law on an ongoing basis. For example, the Commission's biennial review process involves ongoing review and modification of existing rules.[32] Just last ycar, the Commission phased out its spectrum cap." The rules for CALEA, E-911, number

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31 Application at p. 11.

32 *See* 47 U.S.C. § 161.

33 *See 2000 Biennial Regulatory Review, Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, WT Docket No. 01-14, Report and Order, FCC 01-328 (rel. Dec. 18, 2001).

portahility and pooling are all in a state of flux. Here, competitive ETCs such as RCC will be required to deal with whatever the FCC eventually does. The ARLECs' suggestion that all competitive ETC applications for rural areas be suspended pending the consideration as to whether to change rules may properly be described as anti-competitive. No law or rule can be "assumed" to "continue unchanged." If the ARLECs believe the regulatory world will have no certainty or purpose until the Commission adopts rules that are permanent and non-reviewable, they will wait in vain.

Predictably, the ARLECs also suggest that, even though the ongoing review will likely affect both incumbent LECs and competitive ETCs, only their competitors should be blocked from receiving high-cost support. RCC asks the Commission to see the ARLECs' request for what it is: a request lo suspend action on "unresolved Commission policy" so as to prevent the ARLECs from facing viable competition for the first time.

The ARLECs also suggest that changes to the Commission's existing policies that reduce support to CETCs may color a CETC's willingness to construct facilities to serve all customers in its service area: [14] While RCC appreciates the ARLECs' concern, CETCs will and must adapt to any changes that may result from the Joint Board's ongoing review. Carriers in regulated industries deal with changes in the law as a matter of course. Although Congress substantially deregulated mobile wireless services in its1993 amendments to Section 332 of the Act,[35] new government mandates, such as enhanced wireless 911, CALEA, and number pooling, as well as state efforts to re-regulate, all force carriers to adjust.

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34 *See id.*

35 *See* The Omnibus Budget Reconciliation Act of 1993, § 6002(b), Pub. *L.* No. 103-66, Title VI, § 6002(b), amending the Communications ***Act*** of 1934 and codified at 47 U.S.C. §§ 153(n), 332.

Many competitive ETCs have already been designated in rural areas and are already receiving support. Any policy changes proposed by the Joint Board will take existing CETCs into account. Like all other CETCs, RCC will be subject to such policy changes. Should the resulting ETC rules change, each ETC will decide what course to pursue.

III. THE COMMISSION PROPERLY DECLINED TO CONSIDER THE COLLATERAL ISSUES RAISED BY THE ARLECS

In their comments and *ex parte* filings, the ARLECs and other commenters representing ILEC interests inappropriately raised a number of additional issues, all of which are either broad policy issues or have been adjudicated by a final order in multiple proceedings. The Commission properly declined to consider these issues, concluding that such concerns are "beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC."[36]

Nonetheless, RCC is constrained to briefly address the ARLECs' discussion of "explosive" fund growth. The ARLECs, as well as a number of ILEC presentations before this Commission, have completely distorted this debate. The ARLECs' stated concern that designation of additional wireless ETCs will cause the federal universal service fund "to grow to unmanageable proportions"[37] ignores the manner in which support to competitive and incumbent ETCs impacts the fund respectively. As the ARLECs concede, support to competitive ETCs amounts to less than 2% of total high-cost support.[38] Indeed, the increase from 0.4% is steep considering the figure was zero until only recently,

Conveniently, the ARLECs fail to mention that it is the ILECs who have been the greatest beneficiaries of the Commission's recent changes to its universal service rules relating to

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[36] *MO&O* at ¶ 32.

[37] Application at p. 14.

[38] *See id.*

rural areas. Time and again, ILECs have successfully convinced the Commission and Congress to ensure the maximum level ofhigh-cost support to ILECs while seeking to prevent conipetitors from accessing high-cost support, despite the fact that those competitors pay into the fund. While professing concern about growth in the fund, at least five ARLEC member companies were among those ILECs who sued in federal court to remove the cap on the high-cost fund and the cap on the amount of corporate operations expenses that may be reported.'" When the Commission increased rural ILEC support by over $1.26 billion in the *Fourteenth Report and Order,*"" rural telephone companies showed remarkably little concern for the sustainability of the fund.

The ARLECs also ignore the fact that the Commission is addressing the increasing demands on the fund in other proceedings of broader applicability, including taking steps to reform the universal service contribution methodology.[41] While ensuring the future viability of the fund is an important concern, it is no less important that the Commission carry out its statutory responsibility of administering a competitively neutral universal service program that provides rural consumers with comparable choices in telecommunications service to those available in urban areas and places competitors on a level playing field with incumbents.[42]

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[39] *See Alenco*, 201 F.3d at 620-21

[40] *See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers Fourteenth Report and Order. Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244. 11258 (2001) ("*Fourteenth Report and Order*").

[41] *See Report and Order and Second Further Notice of Proposed Rulemaking* in CC Docker Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-1 16, and 98-170 and NSD File No. L-00-72 (rel. Dec. 13, 2002).

[42] *See* 47 U.S.C. § 254(b)(3). *See also Federal-State Joint Board on Universal Service. CC Docket No. 96 45. Recommended Decision*, FCC 02J-2 (Jt. Bd. rel. Oct. 16, 2002), Statement of Commissioner Kevin I. Martin Approving in Part, Dissenting in Part ("I fail to see how the potential for greater funding levels should prevent us from adopting a support system that meets our statutory obligation").

The ARLECs' suggestion that the Commission's decision to apply unspent *funds* from the Schools and Libraries Division ("SLD") to the High Cost program has anything to do with high-cost support to competitive ETCs is disingenuous. During the three quarters in question, over $850 million in unspent funds from the SLD was applied to the High Cost program to stabilize the contribution factor. Based upon a review of available Universal Service Administrative Company ("USAC") data, it appears that the amount of high-cost support received by competitive ETCs during the same period amounted to less than $50 million. Accordingly, it is clear that the reallocation of SLD funds was made necessary by the growth in support to ILECs, who receive almost all of the available high-cost support. Finally, RCC notes that this step was taken as an interim measure pending the reform of the universal service contribution methodology," not pending an ILEC-sponsored rollback of competitive ETC policy.

IV. CONCLUSION

The ARLECs would have the FCC freeze competitive entry by RCC and other competitive ETCs pending a review of its rules, which ultimately may not change the process for designating competitive ETCs. Such a decision would not reflect sound public policy, but would favor one competitor, and one technology, depriving rural consumers of competitive choice. For the reasons stated above, RCC urges the FCC to deny the ARLECs' Application.

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43 *See* ***id.*** at pp. 1-2

Respectfully submitted,

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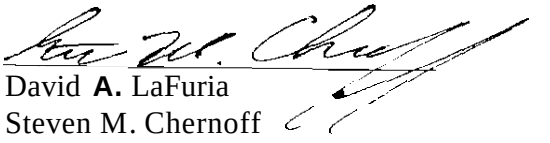
By: 
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January 7, 2003

CERTIFICATE OF SERVICE

I, Janelle T. Wood, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 7th day of January, 2003, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Opposition to Application For* ***Review*** filed today to the following:

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